Supreme Court, U.S.
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No. 82-1832

In The
Supreme Court of the United States
October Term, 1984

TOWN OF HALLIE, TOWN OF SEYMOUR, TOWN OF UNION and TOWN OF WASHINGTON,

Petitioners,

v.

CITY OF EAU CLAIRE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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SUMMARY OF ARGUMENT

I. Contrary to the City's arguments, the Towns' claim is not based upon the City's refusal to sell sewage services in the unincorporated territory constituting the Towns. The Towns' complaint alleges just the opposite. Instead of alleging the City refuses to provide service in this territory, the complaint alleges the City is monopolizing sales in this geographic market.

II. The City concedes the purpose of the *Parker v. Brown*, 317 U.S. 341 (1943), exemption is to protect the State and that the goal of the *Parker* test is to isolate anticompetitive conduct attributable to the state. Accordingly, the City concedes that *Parker* exemption requires that:

> . . . in the case of a political subdivision of the state, the conduct must be pursuant to a "clearly articulated and affirmatively expressed" state policy to replace competition with regulation. [City Br. 7.]

Nonetheless, the City attempts to eliminate that conceded requirement for *Parker* exemption through the proposed "reasonable and foreseeable" test.

The reasonable and foreseeable test does not determine whether the State has clearly articulated its policy to displace competition. The premise of the reasonable and foreseeable test is that the State has permitted its municipalities to make and implement their own parochial policy decisions to engage in anticompetitive conduct. The net result of this test is that municipalities are exempt from the federal antitrust laws unless their conduct is prohibited by State law. Acceptance of this test requires that this Court's decisions in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), and *Community Communications Co. v. Boulder*, 455 U.S. 40 (1982), be overturned.

Lafayette and *Boulder* are correct and must not be overturned. The principles of federalism underlying these decisions require that the policies of the federal antitrust laws be impaired only when they conflict with an exercise of the state's sovereignty. To do otherwise would elevate municipalities to the status of sovereigns contrary to the principles of federalism and would severely undermine the policies of the federal antitrust laws.

The radical change suggested by the City is contrary to the principles announced by this Court. This change is unjustified particularly now that Congress has addressed municipal liability after *Lafayette* and *Boulder* and has not altered the holdings of those cases. It is unjustified now that municipalities have been relieved from the threat of treble damages.

III. The City has not established that the State of Wisconsin had adopted a policy to displace the competition in question with monopoly service by the City. The State of Wisconsin has not articulated or expressed this policy. WIS. STAT. §66.069(2) (c) and §144.07 (1m) do not address this issue. Nor does *Hallie v. City of Chippewa Falls*, 105 Wis. 2d 533, 314 N.W.2d 32 (1982). The most the City has established is that its conduct is not prohibited by Wisconsin law. This is not a basis for *Parker* exemption.

The City is not entitled to Parker exemption. The dismissal of the Towns' complaint was improper and must be reversed.

ARGUMENT

I. The Towns' Complaint Is That The City Has Acquired And Is Continuing To Use Its Monopoly Power In Sewage Treatment Services To Monop-

olize The Sale Of Other Sewage Services In The Unincorporated Territory Which Constitutes The Towns.

A motion to dismiss is not to be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The City of Eau Claire (City) acknowledges that the allegations of the Complaint must be accepted as true. (City Br. 6). Nevertheless, in its effort to obtain *Parker* exemption, the City in its very next paragraph attempts to reformulate the Towns' complaint contrary to its allegations. This cannot be permitted.

The City asserts that the gravamen of the Towns' complaint is that the City refuses to sell sewage services to any person located in the unincorporated territory constituting the Towns. (City Br. i, "Questions Presented," and City Br. 6). In fact, the Towns' complaint alleges just the opposite. The Towns' complaint alleges not only that the City offers to sell to persons located in this unincorporated territory, but that the City is monopolizing these sales by its anticompetitive acquisition and use of its monopoly power in sewage treatment services in this unincorporated territory.[1]

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[1] Competition between sewage utilities, similar to competition between electric utilities, generally is to secure potential customers in geographic areas not yet receiving service. This is the competition to which the Towns' complaint refers. It is the potential customers who are not yet receiving service in the unincorporated territory constituting the Towns that are the target of the City's anticompetitive conduct. Once service is established by the City in a territory, service generally is supplied on a monopoly basis and competition is at an end. For a discussion of the types of competition between electric utilities, see *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921, 930, 934 (2d Cir. 1981); Meeks, *Concentration In The Electric Power Industry: The Impact of Antitrust Policy*, 72 COLUM. L. REV. 64, 81-100 (1972).

The Towns' complaint clearly alleges the City is offering service to persons in the unincorporated territory constituting the Towns:

> The City has provided such [sewage treatment] services to individual land owners in the Towns if and only if such land owners agree that the City will also provide the landowners with sewage collection and transportation services. . . . [J.A. Complaint, paragraph 14, p. 5.]

The complaint alleges that the City is competing with the Towns in the unincorporated territory constituting the Towns for the sale and provision of sewage collection and transportation services. (J.A. Complaint, paragraph 6, p. 3.) It is alleged that the City has obtained and is using its monoply power in sewage treatment services to monopolize sewage collection and transportation services in this unincorporated territory. (J.A. Complaint, paragraphs 5, 6, 14, 15-25, pp. 3, 5-6.) The City's attempt to reformulate the Towns' complaint cannot stand in light of the allegations of the complaint.

The City's brief also assumes that the Towns' complaint is an attack on the City's annexation powers. The City's annexation policies are not the subject of this suit and the Towns seek no relief in that regard. The complaint deals solely with the City's use of its monopoly power over sewage treatment service.

At most, annexation is one by-product of the City's anticompetitive conduct. By the time annexation occurs, the City's anticompetitive conduct has already had its full anticompetitive effect. Surely the City cannot avoid responsibility for this anticompetitive conduct simply by requiring this territory be annexed.

II. The Test Proposed By The City Must Be Rejected Because It Does Not Serve The Conceded Purpose Or Goal Of The Parker Exemption.

The City concedes that the purpose of the *Parker* exemption is to protect State sovereignty and therefore the objective of the *Parker* test is to isolate anticompetitive conduct attributable to the State. (City Br. 7, 10). Therefore, the City must and does concede that municipal anticompetitive conduct is exempt only if it is pursuant to a clearly articulated and affirmatively expressed State policy to displace competition with monopoly service or regulation. (City Br. 7). It is only the State's policy to displace competition which is exempt from the Sherman Act.

Nevertheless, in the next breath the City seeks exemption without establishing the required State policy exists. This was not done openly, since the City had already admitted that this State policy is essential to fulfilling the purpose and goal of the *Parker* exemption. Rather, the City conceals its fundamental alteration of the *Parker* test in the guise of the "reasonable and foreseeable" test.

Ostensibly the "reasonable and foreseeable" test deals with the sufficiency of the State's direction or authorization to the City to implement the State's policy to displace competition. But this is a misdirection. In fact, the reasonable and foreseeable test radically changes whose policy decision to displace competition will receive exemption.

Acceptance of the City's test would do more than grant municipalities latitude in implementing the States' policy to displace competition. It would allow municipalities to create and implement their own parochial anticompetitive policies free of the restraints of the Sherman Act. This would undermine the policies of the federal antitrust laws.

Boulder, 455 U.S. at 51. It would, contrary to our principles of federalism, elevate municipalities to the status of sovereigns.[2]

The concepts the City espouses are nothing more than rearrangements of the concepts recently rejected in *Lafayette* and *Boulder*. They must be rejected again because, as the City concedes, the principles underlying the *Lafayette* and *Boulder* decisions remain valid today.

A. The City concedes that the purpose and goal of Parker exemption require that exemption be granted only if the State has clearly articulated and affirmatively expressed a State policy to displace the competition in question with monopoly service or regulation.

The Towns argued that the first prong of the *Parker* test requires two separate showings: (1) that the State as sovereign has clearly articulated and affirmatively expressed a state policy to displace the competition in question with monopoly service or regulation; and (2) if this State policy exists, that the State has directed or authorized the nonsovereign (in this case the City) to implement that policy by the type of anticompetitive conduct in question. (Towns' Initial Br. 12-29). While the City and the United States disagreed with the Towns' definition of the second showing, both concede that the first showing is a necessary element of the *Parker* test. (City Br. 7; U.S. Br. 12, 16). In particular the City states:

> . . . The *Parker* exemption is predicated upon the need to protect State sovereignty. In order for exemption a state policy must exist to displace competition with

[2] Parker's limitation of the exemption to "official action directed by a state," is consistent with the fact that the State's subdivisions generally have not been treated as equivalent of the States themselves. *Boulder, supra,* 455 U.S. at 50-51.

> regulation or monopoly public service. *City of Lafayette*. . . . [City Br. 7].

Both the City and the United States describe this threshold test as follows:

> . . . in the case of a political subdivision of the state, the conduct must be pursuant to a "clearly articulated and affirmatively expressed state policy to replace competition with regulation". *City of Lafayette; City of Boulder.* [City Br. 7].[3]

Therefore, there is agreement: the threshold test for *Parker* exemption is whether the sovereign State has clearly articulated and affirmatively expressed its policy to displace the competition in question with monopoly service or regulation.

B. In spite of its concession, the City seeks to improperly eliminate the requirement of a clearly articulated State policy to displace competition.

Contrary to its admission that exemption requires that the State has clearly and affirmatively expressed its policy to displace competition, the City attempts to gain exemption without establishing this State policy. This is attempted in the City's formulation of the second showing under the first prong of the *Parker* test.[4] The City's use

[3] The United States repeatedly refers to the fact the municipality must be implementing "a clearly articulated state" policy to displace competition. (U.S. Br. 12, 13, 15 and 16).

[4] The second showing deals with the sufficiency of the State's authorization to the City to implement the State's policy. By definition the second showing is not reached unless it has already been independently determined that the State has expressed a policy to displace competition. The City cannot be authorized to implement a policy which does not exist. Both the City and the United States erroneously accuse the Towns of requiring "compulsion" of the City to satisfy *Parker*. Whether a State must compel or merely authorize a municipality goes only to the *strength* of the State's direction under this second showing. It has nothing to do with whether a State policy has been clearly articulated.

of the Seventh Circuit's "reasonable and foreseeable" test creates state policy out of thin air by stacking inference upon assumption.

Contrary to the dictates of *Boulder*, 455 U.S. at 55, the "reasonable and foreseeable" test does not seek out and identify statutory evidence that the State affirmatively addressed or comprehended the displacement of competition. Instead the Seventh Circuit "assumes" the legislature contemplated this "might" occur. [J.A. 34.] This is not a test to determine whether the State affirmatively addressed the question, it simply eliminates that determination.

Having assumed the legislature contemplated the displacement of competition might occur, the Seventh Circuit "inferred" that the State "condones" this possible displacement of competition presumably because the State did not expressly prohibit it.[5] [J.A. 34.] This is the embodiment of State neutrality which *Boulder* held was not sufficient for exemption. *Boulder*, 455 U.S. at 55.

Then the quantum leap is made. The Seventh Circuit concludes that because it has inferred that the State "condones" the City's anticompetitive conduct, the State "intended" to displace competition with the City's anticompetitive conduct. This is not a method for determining whether the State has clearly articulated its policy to displace competition. It is an elimination of that test.

The need for the "reasonable and foreseeable" test is conclusive evidence that the State has not clearly articulated and affirmatively expressed a State policy to displace competition with monopoly service or regulation.

[5] Of course the sole basis for this inference is the Seventh Circuit's assumption that the State contemplated the City's anticompetitive conduct in the first place.

The City cannot have it both ways. It must either abandon the reasonable and foreseeable test or it must ask the Court to overturn the clear articulation test established in *Lafayette* and *Boulder*.

C. Adoption of the reasonable and foreseeable test would permit municipalities to create and implement their own parochial anticompetitive policies contrary to the policies of the Sherman Act.

The reasonable and foreseeable test focuses on whether the State has delegated policymaking authority to its municipalities which may be used in an anticompetitive fashion by those municipalities. The premise of this test is that the State has not clearly articulated its own policy decision regarding the displacement of competition. Rather the State has left its municipalities free to make their own policy decisions.

Under traditional municipal law concepts, unless the State has expressly prohibited the anticompetitive use of a delegated authority, the municipalities' anticompetitive use of that authority is reasonable and foreseeable.[6] The

[6] The Towns' Initial Brief pointed out that Wisconsin's statutory scheme gives municipalities *all* powers that could be given, except as expressly withdrawn by constitution or statute. Town's Initial Br. at 33, n. 20. This is the result of the home rule authority of WIS. STAT. § 62.11(5), relied on by the Wisconsin Court to hold that similar activity by a Wisconsin municipality was not prohibited under State law. *Hallie v. City of Chippewa Falls*, 105 Wis.2d 533, 314 N.W.2d 321 (1982). The consistent interpretation of this statute has been that, rather than looking for a statute to authorize its activities, a city can be *assumed* to have authority unless withdrawn elsewhere. *Hallie, supra*, 105 Wis.2d 539-40; *Wis. Assoc. of Food Dealers v. City of Madison*, 97 Wis.2d 426, 432, 293 N.W.2d 540 (1980); *Fiore v. Madison*, 264 Wis. 482, 485, 59 N.W.2d 460 (1953); *Hack v. Mineral Point*, 203 Wis. 215, 218-20, 233 N.W. 82 (1931).

Against this backdrop, the "reasonable and foreseeable" test becomes meaningless. Determining whether an act was

(Continued on next page)

City's test is a test which cannot be failed: it adds nothing to the simple question of whether an act is legal as a matter of State law. If the State prohibits certain anticompetitive municipal conduct, it is unlawful as a matter of State law. If the State does not prohibit such conduct and permits municipalities to do as they please, under the City's proposed test the conduct is exempt. Therefore, there are no situations in which municipal anticompetitive conduct is limited by the federal antitrust laws. The result is that municipalities are exempt simply because of their status as subdivisions of the State.

The difference between the *Boulder* test and the reasonable and foreseeable test is fundamental. Under the *Boulder* test, it is the State which must address and decide to displace competition and which then directs or authorizes its municipalities to implement that policy. Under the reasonable and foreseeable test it is the States' municipalities which address, create and carry out their own policies to displace competition.

(Continued from previous page)

"reasonable and foreseeable" or "contemplated" by the legislature, as that expression is used by the City, amounts to nothing more than determining if authority exists under State law for the city's actions.

Nor is the Wisconsin experience unique. Over 40 states have "home-rule" provisions of some sort, where municipalities are granted broad authority to act as they see fit. 2 McQUILLIN, MUNICIPAL CORPORATIONS, § 10.13 and n. 1, 7-8 (3d 1979). And the generally accepted interpretation of municipal authority is that it includes those powers "reasonably inferred" from powers granted. McQUILLIN *supra*, § 10.12. Thus, the "reasonable and foreseeable" test will be nothing more than an application of traditional municipal law tests to federal antitrust law, a result this Court has rejected in both *Boulder, supra*, 455 U.S. at 53, n. 16, and *Lafayette, supra*, 425 U.S. at 415, n. 45.

D. The principles announced in Lafayette and Boulder require that the reasonable and foreseeable test be rejected.

The City's argument that the reasonable and foreseeable test flows from *Boulder* is based upon a misreading of that case. The City's interpretation of *Boulder* is premised on the assumption that no State law authority existed for the City of Boulder's municipal action. (City Br. 3, 12) In fact, the Court in *Boulder* assumed just the opposite.

> For the purposes of this decision we will assume, without deciding, that respondent's enactment of the moratorium ordinance under challenge here did fall within the scope of the power delegated to the City of Boulder by virtue of the Colorado Home Rule Amendment. [455 U.S. at 53, n. 16.]

Clearly Boulder's enactment of the cable moratorium ordinance was assumed to be within the scope of power delegated to the City. Under the City's interpretation of the *Parker* test that ends the inquiry. Under the City's test it would be assumed Colorado "contemplated" this anticompetitive effect and "inferred" that the State "condoned" it. Under the City's proposed test, Boulder's conduct was exempt. But this is not the result in *Boulder*. The result was just the opposite.

The very contemplation arguments the City now makes were made and rejected in *Boulder*.[7] The Court expressly rejected these arguments holding that Colorado was merely neutral regarding these anticompetitive actions. *Boul-*

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[7] Boulder argued that because the State granted it the power to enact cable ordinances, the State "contemplated" Boulder's enactment of an anticompetitive program. *Boulder*, 455 U.S. at 54-55. Boulder argued that it should be inferred from the authority given Boulder to regulate cable television that the legislature "contemplated" the kind of action complained of. *Boulder*, 455 U.S. at 55.

der, 455 U.S. at 55. This is nothing new. Mere lawfulness under State law was rejected in *Lafayette*. *Lafayette*, 435 U.S. at 415, n. 45. Stated another way, when the State is neutral, the policy decision to displace competition is made by the municipality and the municipalities' parochial decision to engage in anticompetitive conduct is not exempt from the Sherman Act.

The effect of the City's test would be to elevate cities to the status of sovereigns. It would permit cities to create and implement anticompetitive policies guided solely by their own parochial interests. This would serve neither the policies of the Sherman Act nor the principles of federalism. Such anticompetitive conduct not only adversely impacts cities' competitors, it impacts the persons required to buy their services from these cities. The radical shift in law the City now calls for is totally unjustified. This is particularly true now that municipalities have been relieved from the threat of treble or any damages. This is particularly true because Congress has recently considered and amended the Sherman Act after *Lafayette* and *Boulder* were decided. This Congressional amendment, although treating municipal liability under the Sherman Act, left unaltered this Court's definition for *Parker* exemption.[8]

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[8] The conference version of H.R. 6027, The Local Government Antitrust Act of 1984, (see appendix to this brief) passed by both houses of Congress after *Lafayette* and *Boulder*, does not alter in any way the test of exemption defined in those cases. The substance of the bill does not affect this case because the Towns have requested injunctive relief only, not damages. The bill does render moot many of the concerns of *amici* regarding treble damage liability.

III. The State Of Wisconsin Has Neither Clearly Articulated Nor Affirmatively Expressed A State Policy To Replace Competition With City Monopoly Service In The Sale Of Sewage Services In The Unincorporated Territory Constituting The Towns.

The Towns' claim is that the City is using its monopoly power in one product market, sewage treatment services, to monopolize competition in other product markets, sewage collection and transportation services. (Section I *supra*.) The geographic market in which the City is wielding its monopoly power to monopolize other product markets is the unincorporated territory constituting the Towns. (Section I *supra*.) The relief sought by the Towns is an order requiring the City to cease using its monopoly power to monopolize sewage collection and transportation services. The geographic market in which this relief is sought is the unincorporated territory constituting the Towns.

The Towns' position is straightforward. The Towns' claim involves the City displacing competition in sewage collection and treatment service in the unincorporated territory around the City with monopoly service by the City. *Parker* exemption requires that:

> . . . in the case of a political subdivision of the state, the conduct must be pursuant to a "clearly articulated and affirmatively expressed" state policy to replace competition with regulation. *City of Lafayette; City of Boulder*. [City Br. 7.]

Therefore the threshold issue is whether the State of Wisconsin has clearly articulated and affirmatively expressed its State policy that competition in sewage collection and transportation service be replaced by City monopoly service in the unincorporated territory constitut-

ing the Towns.[9] Neither the City nor the United States identify a clear affirmative expression of this State policy. They do not because no such State policy exists. The threshold requirement for *Parker* exemption is not met, therefore exemption must be denied.

A. Hallie v. City of Chippewa Falls does not establish that the State of Wisconsin clearly articulated or affirmatively expressed a policy that the city monopolize sewage services in the unincorporated territory constituting the Towns.

The question presented in *Hallie v. City of Chippewa Falls,* 105 Wis.2d 533, 314 N.W.2d 321 (1982) was whether anticompetitive conduct similar to the conduct involved in this case was prohibited by State law. The specific holding in *Chippewa Falls* was that State law did not prohibit such conduct. *Chippewa Falls,* 105 Wis.2d at 542.

Chippewa Falls did not determine that the State of Wisconsin clearly articulated and affirmatively expressed a policy that competition be displaced. This is the objective of the *Parker* test which the State court unambiguously declared it was not applying. *Chippewa Falls,* 105 Wis.2d at 537-38. In addition the State court explicitly

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[9] The question is not whether State law prohibits the City's anticompetitive conduct. This conduct is prohibited by federal law applicable to the City. Rather the question is whether the State has affirmatively expressed its policy to displace competition. The question is whether the State's policy is in direct conflict with enforcement of the Sherman Act. Contrary to the City's assertions (City Br. 11), the City could exercise its State law authority in many ways without running afoul of the Sherman Act. The most obvious of these ways are for the City to offer treatment services to the Towns at a reasonable and fair price, or for a City to never acquire—under the facts of this case, to divest itself of—a monopoly over treatment services in the Towns.

refused to apply its own previously established state law rule:

> . . . that an entity cannot be exempted from the state antitrust statute unless the conduct of the entity is wihin the express provisions of the conflicting [state] statute and then only if its conduct is in furtherance of the conflicting [state] statute's legislatively stated purpose. (Cites omitted and parenthetical added.) [*Id.* at 528-39.]

These declarations of what the state court was not attempting in *Chippewa Falls* unambiguously establish that the State court did not consider the federal question presented in this case.

The *Chippewa Falls* case, relying heavily if not completely on Wisconsin's home rule powers, held that this anticompetitive conduct is not prohibited by State law. *Chippewa Falls* merely establishes what was assumed *Boulder, i.e.* that the conduct in question fell within the scope of the power delegated to the City. *Boulder, supra,* 455 U.S. at 53, n. 16. As the result in *Boulder* establishes, this does not establish *Parker* exemption. See also, *LaSalle National Bank v. County of Lake,* 579 F. Supp. 8 at 14, n. 8 (N.D. Ill. 1984).

B. WIS. STAT. § 66.069(2) (c) does not express a State policy that competition be displaced with monopoly service.

The City and the United States suggest WIS. STAT. §66.069(2) (c) is an inherently anticompetitive legislative statement which reflect the State's policy that the City engage in the anticompetitive conduct described in the Towns' complaint. This is not true.

Chippewa Falls does not stand for this proposition. In discussing WIS. STAT. §66.069(2) (c), the State court said:

> Although the statutes do not specifically so provide, it seems that the legislature viewed annexation by the city of a surrounding unincorporated area as a reasonable quid pro quo that a city could require before extending sewer services to the area. [*Chippewa Falls, supra,* 105 Wis.2d at 540-41.]

This language does not even address the subject of whether the State had adopted a policy that competition in sewage service be displaced with monopoly service by the City.

As has been noted above, *supra* n. 1, once a sewage utility actually commences serving a given territory, service in that territory is provided on a monopoly basis. Therefore, in Wisconsin the sewage utility has a monopolist's duty to serve persons located in that territory. *Milwaukee v. Public Service Comm.,* 268 Wis. 116, 120, 66 N.W.2d 718 (1954). WIS. STAT. §66.069(2) (c) deals with this subject.

WIS. STAT. §66.069(2)(c) states that a city or village sewage utility can decline from establishing monopoly service in an unincorporated territory and thereby avoid a duty to serve in that territory. The statutes make clear, however, that these utilities may not withdraw from a territory in which it has established monopoly service. The State policy announced in §66.069(2) (c) is that a city may decline to obtain monopoly power in a given unincorporated territory and thereby avoid a duty to serve in that territory.

There is nothing inherently anticompetitive about this State statute. Unilateral refusals to deal are not inherently anticompetitive. *United States v. Colgate & Co.,* 250 U.S. 300, 307 (1919). It is only when that refusal to deal is coupled with monopoly power utilized to monopolize that a violation of the Sherman Act occurs. (Towns' Initial Br. 10-12). Nothing in §66.069(2) (c) indicates a city may monopolize sewage services in an unincorporated territory it claims it refuses to serve. If anything, this proposition is inconsistent with the policy of §66.069(2) (c).

More importantly, §66.069(2)(c) has no bearing on the allegations of the complaint. The Towns do not allege the City is refusing to provide sewage service in this unincorporated territory. The claim is just the opposite. The claim is that the City is monopolizing sales in this territory.

C. WIS. STAT. § 144.07(1m) does not grant the City any authority nor does it express a State policy that competition be displaced by monopoly service in unincorporated territories.

WIS. STAT. §144.07(1m) has no application to this case. This statute only applies when the State compels a city to serve an unincorporated territory. This has not occurred in this case. The best evidence that the State policy underlying §144.07(1m) will not be impaired by enforcement of the Sherman Act, is the simple fact the statute does not apply to the case.

WIS. STAT. §144.07(1m) certainly confers no authority on the City to monopolize sewage service in unincorporated territories. At most this statute states that competition may be displaced by monopoly service when the State through the Wisconsin Department of Natural Resources (DNR) orders it.

Chippewa Falls, 105 Wis.2d at 542, does not hold otherwise. The State court said the following regarding 144.07 (1m):

> While the facts of the present case are clearly not covered by this statute because no DNR order is in-

> volved, this statute is still helpful in indicating that the legislature seems to view annexation as an appropriate prerequisite to the provision of sewage service outside the limits of a city. [*Id.* at 542.]

The State court did not address the subject of displacing competition with monopoly service, or come near to applying the clear articulation test announced by this Court. The only holding that has any bearing on this case is that §144.07(1m) does not apply.

Finally, this statute has no application to the issue presented here. The City claims §144.07(1m) authorizes it to refuse to offer service in unincorporated territory. Even if this were true, the Towns' complaint alleges just the opposite. A State policy that the City may refuse to offer service is quite different from a State policy that the City may monopolize service.

CONCLUSION

The judgment of the District Court and the Court of Appeals should be reversed and the case remanded to allow the Towns to prove their allegations.

Respectfully submitted this 14th day of November, 1984.

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APPENDIX

98TH CONGRESS) (REPORT
2d Session) (98-1158

HOUSE OF REPRESENTATIVES

LOCAL GOVERNMENT ANTITRUST ACT OF 1984

OCTOBER 10, 1984.—Ordered to be printed

Mr. RODINO, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany H.R. 6027]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 6027) to clarify the application of the Federal antitrust laws to the official conduct of local governments, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

This Act may be cited as the "Local Government Antitrust Act of 1984.".

SEC. 2. *For purposes of this Act—*

(1) the term "local government" means—

(A) a city, county, parish, town, township, village, or any other general function governmental unit established by State law, or

(B) a school district, sanitary district, or any other special function governmental unit established by State law in one or more States,

(2) the term "person" has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(A)), but does not include any local government as defined in paragraph (1) of this section, and

(3) the term "State" has the meaning given it in section 4G(2) of the Clayton Act (15 U.S.C. 15g(2)).

SEC. 3 *(a) No damages, interest on damages, costs, or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) from any local government, or official or employee thereof acting in an official capacity.*

(b) Subsection (a) shall not apply to cases commenced before the effective date of this Act unless the defendant establishes and the court determines, in light of all the circumstances, including the stage of litigation and the availability of alternative relief under the Clayton Act, that it would be inequitable not to apply this subsection to a pending case. In consideration of this section, existence of a jury verdict, district court judgment, or any stage of litigation subsequent thereto, shall be deemed to be prima facie evidence that subsection (a) shall not apply.

SEC. 4. *(a) No damages, interest on damages, costs or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) in any claim against a person based on an official action directed by a local government, or official or employee thereof acting in an official capacity.*

(b) Subsection (a) shall not apply with respect to cases commenced before the effective date of this Act.

SEC. 5. *Section 310 of the Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1985 (Public Law 98-411), is repealed.*

SEC. 6. *This Act shall take effect 30 days before the date of the enactment of this Act.*

And the Senate agree to the same.

PETER W. RODINO,
JACK BROOKS,
DON EDWARDS,
JOHN F. SEIBERLING,
BILL HUGHES,
MIKE SYNAR,
GEO. W. CROCKETT, JR.,
CHARLES SCHUMER,
EDWARD FEIGHAN,
HAMILTON FISH,
CARLOS J. MOORHEAD,
HENRY HYDE,
DANIEL E. LUNGREN,
Managers on the Part of the House.

STROM THURMOND,
ORRIN HATCH,
HOWARD METZENBAUM,
Managers on the Part of the Senate.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 6027) to clarify the application of the Federal antitrust laws to the official conduct of local governments, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The Senate amendment to the text of the bill struck out all of the House bill after the enacting clause and inserted a substitute text.

The House recedes from its disagreement to the amendment of the Senate with an amendment which is a substitute for the House bill and the Senate amendment. The differences between the House bill, the Senate amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

STATEMENT OF MANAGERS

In referring in section 4 to the application of the antitrust laws to the conduct of non-governmental parties directed by a local government, the conferees borrowed the phrase "official action directed by" a local government from *Parker v. Brown*, 317 U.S. 341, 351 (1943); and the conferees intend that *Parker* and subsequent cases interpreting it shall apply by analogy to the conduct of a local government in directing the actions of non-governmental parties, as if the local government were a state.

The application to pending cases of the money damage protection afforded by section 3 will be based upon a case-by-case determination by the district court. The local government has the burden of proof to establish to the court's satisfaction that it would be inequitable not to apply this act to the pending case. The court is to consider all relevant circumstances. The statute mentions two of the factors that the court should consider—stage of the litigation and the availability of alternative relief under the Clayton Act. Where a pending case is in an early stage of litigation and where injunctive relief can remedy the problem, the defendant local government may be able more easily to sustain its burden. Where a case is in more advanced stages of litigation or where injunctive relief is unavailable or incomplete, the burden would become more difficult. If a case has progressed to or beyond a jury verdict or district court judgment, a local government defendant would need compelling equities on its side to justify the application of this section to the pending case.

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